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DISCRIMINATION AGAINST INDIGENOUS PEOPLES

Explanatory note concerning the draft declaration on the rights of indigenous peoples

by

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on Indigenous Populations

1. In connection with the revised working paper on the draft declaration on Indigenous Peoples, (E/CN.4/Sub.2/1993/26), of 8 June 1993, which I submitted pursuant to Sub-Commission resolution 1992/33 and Commission on Human Rights resolution 1993/31, I would like to make the following brief explanatory comments:

(i) I have tried to edit the text to make it more clear, concise, and consistent, in the hope that this will facilitate our work, and avoid any unnecessary misunderstandings or stylistic discussions;

(ii) In this regard, I would like to make an attempt to analyse, briefly, some of the terms and concepts used in the draft declaration, and offer my personal views, as Chairperson-Rapporteur, on how we may resolve the relevant questions which remain outstanding.

(a) The term "a people" or "peoples"

2. There is no legal definition of "a people". Nor is there a generally accepted sociological or political definition of "a people".

3. General or customary international law does not provide any rules or principles concerning the term "indigenous peoples", as such, or its relationship with the wider concept of "peoples". 1/

4. Certain Governments have sought to narrow the definition of "peoples" in order to limit the number of groups entitled to exercise a claim to self-determination. On the contrary, indigenous groups, supported by many eminent international lawyers, have pressed for a broader application of the term "peoples" before different forums of the United Nations system, and in particular before the Working Group on Indigenous Populations. For example, a number of indigenous nations and communities, while acknowledging the importance of the 1989 International Labour Organisation (ILO) Convention No. 169, concerning Indigenous and Tribal Peoples in Independent Countries, have expressed their great disappointment over the inclusion in paragraph 3 of article 1 of a disclaimer which states that: "The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."

5. In the opinion of the present writer, whether a group is "a people" for the purposes of self-determination depends, first, on the extent to which the group making this claim shares ethnic, linguistic, religious or cultural bonds, although the absence or weakness of some of these bonds or elements need not invalidate their claim as a whole.

6. There is also a subjective element, which should weigh the extent to which the members of the group perceive the group's identity as distinct from the identities of other groups.

7. Indigenous groups are unquestionably "peoples" in every political, social, cultural and ethnological meaning of this term. They have their own specific languages, laws, values and traditions; their own long histories as distinct societies and nations; and a unique economic, religious and spiritual relationship with the territories in which they have lived. It is neither logical nor scientific to treat them as the same "peoples" as their neighbours, who obviously have different languages, histories and cultures.

8. The United Nations should not pretend, for the sake of a convenient legal fiction, that those differences do not exist.

9. It is true that in certain cases, and under particular conditions, indigenous and other peoples living side by side as neighbours within one State may gradually blend their characteristics, reducing their original differences. The legal consequences of such changes must be determined in specific contexts.

(b) The principle "of self-determination" 2/

10. Preambular paragraphs 15 and 16 and operative paragraph 3 of the draft declaration refer to the principle of "self-determination".

11. Indigenous peoples have insisted, and rightly so, on the right to self-determination. Taking into consideration their justifiable wishes and the comments made in the relevant debates of the Working Group, I included the above-mentioned principles in the revised draft declaration.

12. Of particular importance are the provisions contained in operative paragraph 3, which reads:

> "Indigenous peoples have the right to self-determination in accordance with international law, subject to the same criteria and limitations as applied to other peoples in accordance with the Charter of the United Nations. By virtue of this, they have the right, inter alia, to negotiate and agree upon their role in the conduct of public affairs, their distinct responsibilities and the means by which they manage their own interests."

13. These provisions should constitute and define, in my opinion, "the right of indigenous peoples to self-determination", and should comprise a new contemporary category of the right to self-determination. It should be emphasized that this category of the right to self-determination does not constitute a second class exercise or expression of the rights of peoples. 3/

14. In this respect, it is useful to clarify certain issues and to attempt a reply to some relevant questions. Thus, upon whom is the classic "right to self-determination" conferred, according to the "new United Nations law" regulating the subject since the Second World War? The answer - stated in identical terms in the 1960 Declaration on the Granting of Independence to Non-Self-Governing Territories and Peoples, and in common article 1 of the two international covenants on human rights - is as simple in its formulation as it is problematic in application.

15. "All peoples have the right of self-determination". Nevertheless, the total context in which this universal goal has been declared demonstrates an intention to confine the right of self-determination to peoples who are still "dependent", or who are still being subjected to "alien subjugation, domination and exploitation".

16. "By virtue of that right", the above-mentioned common article 1 of the international covenants states, all peoples "freely determine their political status and freely pursue their economic, social and cultural development". The right to self-determination is also linked by both international covenants with what has come to be termed "permanent sovereignty" over natural wealth and resources.

17. In theory, at least, it is possible to distinguish between "external" self-determination, which means the act by which a people determines its future international status and liberates itself from "alien" rules; and

"internal" self-determination, which refers chiefly to the selection of the desired system of government and administration, and the substantive nature of the regime selected.

18. However, the nature of the link between these components of "self-determination" has been postulated differently by different groups of States, with consequent implications for the perceived scope of the right of self-determination, and of the rights of competing claimants in specific circumstances.

19. The right to "internal self-determination" is best viewed as entitling a people to choose its political allegiance, to influence the political order in which it lives, and to preserve its cultural, ethnic, historical or territorial identity.

20. It should also be underlined that there are some general limitations on the exercise of the rights to self-determination which are expressed most thoroughly in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations. It states, in its relevant part, that:

> "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principles of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

21. The meaning of the aforesaid provisions is plain. Once an independent State has been established and recognized, its constituent peoples must try to express their aspirations through the national political system, and not through the creation of new States. This requirement continues unless the national political system becomes so exclusive and non-democratic that it no longer can be said to be "representing the whole people". At that point, and if all international and diplomatic measures fail to protect the peoples concerned from the State, they may perhaps be justified in creating a new State for their safety and security. Indeed, in such a state of affairs, legal arguments cease to have any real significance since peoples will defend themselves by whatever means they can. Continued government representivity and accountability is therefore a condition for enduring enjoyment of the right of self-determination, and for continued application of the territorial integrity and national unity principles.

22. "Self-determination" is a continuing dynamic right, in the sense that it can be reawakened if, at any moment, representative democracy fails and no alternatives exists for the defence of fundamental rights and freedoms.

23. The concept of "self-determination" has accordingly taken on a new meaning in the post-colonial era. Ordinarily, it is the right of the citizens of an existing, independent State to share power democratically. However, a State may sometimes abuse this right of its citizens so grievously and

irreparably that the situation is tantamount to classic colonialism, and may have the same legal consequences. The international community and the present writer discourage secession as a remedy for the abuse of fundamental rights, but, as recent events around the world demonstrate, secession cannot be ruled out completely in all cases. The preferred course of action, in every case except the most extreme ones, is to encourage the State in question to share power democratically with all groups, under a constitutional formula that guarantees that the Government is "effectively representative".

24. With few exceptions, indigenous peoples were never a part of State-building. They did not have an opportunity to participate in designing the modern constitutions of the States in which they live, or to share, in any meaningful way, in national decision-making. In some countries they have been excluded by law or by force, but in many countries that they have been separated by language, poverty, misery, and the prejudices of their non-indigenous neighbours. Whatever the reason, indigenous peoples in most countries have never been, and are not now, full partners in the political process and lack others' ability to use democratic means to defend their fundamental rights and freedoms.

25. What, then, should be the response of the international community to the situation of indigenous peoples who lack effective partnership in governing the States in which they live? It would be inadmissible and discriminatory to argue that these peoples do not have the right to self-determination merely because they are indigenous. Such an argument would imply not only that they do not have the right to secede, but also that they do not have the right to demand full democratic partnership. A more logical and useful approach would be to agree, in keeping with the above-mentioned declaration on friendly relations, that indigenous peoples have the right to self-determination, and that this means that the existing State has the duty to accommodate the aspirations of indigenous peoples through constitutional reforms designed to share power democratically. It also means that indigenous peoples have the duty to try to reach an agreement, in good faith, on sharing power within the existing State, and to exercise their right to self-determination by this means and other peaceful ways, to the extent possible.

26. Furthermore, the right of self-determination of indigenous peoples should ordinarily be interpreted as their right to negotiate freely their status and representation in the State in which they live. This might best be described as a kind of "belated State-building", through which indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed and just terms, after many years of isolation and exclusion. This does not mean that assimilation of indigenous individuals as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.

27. Greenland offers an example of what can be achieved through this kind of process. Canada has endeavoured to follow this course as well and, while there has not yet been any definite settlement owing to difficulties with the procedures followed, it is clear that a new Canadian State is gradually emerging. As the Secretary-General of the United Nations himself aptly stated, in his remarks at the opening of the International Year of Indigenous

People before the United Nations General Assembly on 10 December 1992, "it is time to recognize that diversity can be the foundation of greater unity".

28. This conclusion is reinforced by the fact that indigenous peoples themselves have overwhelmingly expressed their preference for constitutional reform within existing States as opposed to secession. Most indigenous peoples also acknowledge the benefits of a partnership with existing States, in view of their small size, limited resources and vulnerability. It is not realistic to fear indigenous peoples' exercise of the right to self-determination. It is far more realistic to fear that the denial of indigenous peoples' rights to self-determination will leave the most marginalized and excluded of all the world's peoples without a legal, peaceful weapon to press for genuine democracy in the States in which they live.

29. The revised working paper combines the above-mentioned principles in a much more positive, contemporary and dynamic form which, instead of focusing on the right to form new States when existing Governments fail, promotes the negotiation of arrangements to strengthen States and make them truly representative, democratic, liberal and inclusive.

30. This approach is consistent with the expressed aspirations of indigenous peoples themselves, who have always sought co-existence wherever possible, while taking into account, in general, the relevant views expressed by a number of Governments before the Working Group.

31. It is also an approach in which the United Nations can play an active and positive technical role, providing information on possible models and facilitating a constructive dialogue.

32. Operative paragraphs 3, 29 and 30 of the revised working paper refer to the rights of "autonomy" and "self-government" of indigenous peoples, as well as their right to determine the structures and to select the membership of their autonomous or self-governing institutions, in accordance with their own procedures. "Autonomy" is not a term of art in existing international or constitutional law. Personal and political autonomy is, in some sense, the right to be different and to remain free to promote, preserve and protect values which are beyond the legitimate reach of the rest of society. 4/

33. With regard to the interpretation and analysis of the right to autonomy and self-government, the seminar which took place in Nuuk, Greenland, from 24 to 28 September 1991, made a meaningful contribution. 5/

34. One of the formulas recently considered in Canada concerning "Aboriginal self-government", refers to "self-government within the Canadian Federal system".

(c) The term "territories"

35. Operative paragraphs 23 to 26 of the revised working paper refer to the right of indigenous peoples to their "lands and territories". 6/ In this respect it should be first of all clarified that the reference to "territories" should not be confused with the concept of "territorial integrity" in international law. It is not meant to imply a separation from

the territory of the State as a whole in political terms, for it is clear that an indigenous people, even in the exercise of its rights to autonomy or self-government, is still ordinarily connected with the political territory or sovereignty of the State, as, for example, in the case of Greenland.

36. Rather, the term "territory" is used here in same sense as the often-criticized 1957 ILO Convention No. 107 concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries. 7/ Hence the term "territory" in the above-mentioned paragraphs conveys some notion of the totality of indigenous peoples' relationship to the land and to all of its resources and characteristics. It is fundamental that this relationship be understood as more than simply a matter of "land ownership", in the usual sense of private ownership by citizens, but a special and comprehensive kind of relationship that is historical, spiritual, cultural and collective. 8/

37. It may also properly be observed, in this context, that the former international legal doctrine of terra nullius, which treated indigenous peoples as having no lands or territorial rights, was not only been rejected by the International Court of Justice in its 1975 Advisory Opinion in the case of The Western Sahara, but also explicitly or implicitly, by the high courts of many of the countries concerned, for example in the recent Mabo decision in Australia, as well as the Guerin decision in Canada, and Santa Fe Pacific Railway Co. in the United States.

(d) The question of implementation

38. The importance of the implementation of the draft declaration should be emphasized. In this respect, operative paragraph 39 of the revised working paper provides that the United Nations shall monitor the implementation of the declaration, through a body at the highest level with special competence in this field and with the direct participation of indigenous peoples.

39. Since 1985, the Working Group has given priority to standard setting. With the completion and eventual adoption of the Declaration, the Working Group will be ready to assume new responsibilities. In addition, I believe that it is time for indigenous peoples themselves to play a more formal and direct role in United Nations decision-making that concerns them. This is why I proposed, in my presentation at the World Conference on Human Rights, that the Working Group be raised to the level of a permanent expert committee of the Economic and Social Council; that it be given a broad mandate to monitor and promote the implementation of the Declaration; and that a means be found to ensure indigenous representation in its membership.

40. Operative paragraph 39 would take a step in that direction, but it would also be important that the Working Group make additional suggestions for its future role and functioning, so that we will be in a position to make a comprehensive proposal to our parent bodies this year. In this respect, a note has been prepared by the present writer, and will be circulated for consideration. No more lasting, useful contribution could be made to the celebration of the International Year of the World's Indigenous People than the evolution of this Working Group into a truly representative, effective, and permanent body of the United Nations system.

Notes

1/ See I. Brownlie, Treaties and Indigenous Peoples: The Robb Lectures 1991, Clarendon Press, Oxford, 1992, pp. 61-62. In connection with "indigenous peoples" and international law, see R. Barsh, "Indigenous Peoples: an emerging object of international law", AJIL, 8, 1986, p. 369 and following.

2/ See, G. Alfredson, "The right to self-determination and indigenous peoples", in Modern Law of Self-Determination, ed. by C. Tomuschat; ed. also, E-I.A. Daes, "Some considerations on the right of indigenous peoples to self-determination", in Transnational Law and Contemporary Problems, vol. 3, No. 1, Spring 1993, pp. 35-45.

3/ See M.H. Halperin and D.J. Scheffer with P.L. Small, Self-Determination in the New World Order, A Carnegie Endowment Book, Washington, D.C., 1992, pp. 51 and 76.

4/ See H. Hannum, "Autonomy, Sovereignty and Self-determination", University of Pennsylvania Press, Philadelphia, p. 4.

5/ See the report of the Meeting of Experts to review the experience of countries in the operation of schemes of internal self-government for indigenous peoples, Nuuk, Greenland, 24-28 September 1991, E/CN.4/1992/42, pp. 4-18.

6/ See E-I.A. Daes, Native peoples' rights, Les Cahiers de Droit, vol. 27, No. 1, Laval University, Canada, 1986, pp. 123-133.

7/ See in this connection the analysis of the ILO Conventions 107/1957 and, in particular, 169/1989 in S-J. Anaya, "Indigenous Rights Norms in Contemporary International Law", Arizona Journal of International and Comparative Law, vol. 8, No. 2, 1991, pp. 6-15.

8/ See G. Nettheim, The Right of Peoples, by J. Crawford, ed., Clarendon paperbacks, 1988, pp. 112, 113, 121-123.